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Fair Credit Reporting Act (2010)

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THE UNIVERSITY of TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League

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The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a $10 charge for additional copies of "Fair Credit Reporting Act."

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Provisions of the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 *et seq.*), which is the federal law governing consumer information, have been amended by the Consumer Reporting Employment Clarification Act (CRECA) of 1998 (Pub. L. No. 105-347) and the Fair and Accurate Credit Transaction Act (FACTA) of 2003 (Pub. L. No. 108-159). Specifically, the FCRA requires employers who use outside agencies to perform credit or other background checks (including criminal, reference, or driving record checks), as defined by CRECA, to comply with comprehensive notice, consent, and disclosure obligations both prior to doing the checks and after the results are reported. The provisions of FCRA, CRECA and FACTA directly affect those cities that use outside agencies to secure information about applicants and employees.

The rules apply to anyone over whom the Federal Trade Commission (FTC) has jurisdiction and who maintains or possesses consumer information for business purposes. It applies to individuals and to both large and small organizations that use consumer reports. This includes consumer reporting companies, lenders, insurers, employers, landlords, government agencies, mortgage brokers, car dealers, attorneys, private investigators, debt collectors, individuals who pull consumer reports on prospective at-home employees, and entities that maintain information in consumer reports as part of their role as a service provider to other organizations covered by the rule.

According to the act (15 U.S.C. § 603(d)(1)), the definition of a consumer report includes:

> *"any written, oral, or other communication of any information by a consumer reporting agency regarding a consumer's reputation, personal characteristics or mode of living that is used as a factor to establish the consumer's eligibility for … employment"*.

Consumer information is defined as any record about an individual that is a consumer report or is derived from a consumer report. However, according to the FACTA amendment, "a consumer report does not include communications made to an employer while investigating suspected employee misconduct relating to employment or employee compliance with applicable laws or with pre-existing written policies of the employer" (15 U.S.C. § 603(x)(1)(B)(i-ii)).

Generally, a city that accesses a consumer report while conducting a background check on an applicant has two main obligations: "(1) to comply with disclosure requirements and inform the applicant in a separate document that a consumer report may be secured for employment purposes and (2) to obtain authorization in written form from the applicant to request the consumer report" (15 U.S.C. § 604(b)(2)(A)(i-ii)). The city must certify to the consumer reporting agency that it has satisfied these disclosure and consent requirements as a condition of receiving the consumer report.

Before a consumer reporting agency may provide or prepare a consumer report for an employer, the employer must certify to the agency that: (1) it has provided the required "clear and

conspicuous disclosure" to the individual who is the subject of the report; (2) it has received written authorization to obtain the report; (3) it will not use the information in violation of any applicable federal or state equal employment opportunity law or regulation; and (4) the employer will abide by the requirements of the law if any adverse action is taken wholly or partially as a result of the report (15 U.S.C. § 604(b)(1)(A)(i)). An adverse action includes a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee (15 U.S.C. § 603(k)(B)).

Once the employer has the consumer report, it may decide to take an action based on the consumer report (or based in part on the consumer report). However, before taking any adverse employment action against someone based in whole or in part on the consumer report, the employer must provide the affected individual with a pre-adverse action disclosure which includes a copy of the consumer report as well as a written description of that individual's rights under the FCRA (15 U.S.C. § 604(b)(3)(A)). In other words, when the employer receives the consumer report, he/she must immediately send a copy of the report and the individual's rights statement to the applicant. Consumer reporting agencies are required to provide a form to employers that outlines the rights of the individual. The form can be distributed to applicants and employees (15 U.S.C. § 604(b)(1)(B)).

Then, if the employer takes adverse action based upon the subject of the report, the employer must by oral, written or electronic means: (1) provide notice of the adverse action to the affected individual; (2) provide the name, address, and telephone number of the consumer reporting agency that provided the report to the employer (the telephone number provided must be the toll-free number where the individual can reach the agency, if the agency maintains files on consumers on a nationwide basis), along with a statement that the agency did not make the decision to take adverse action and thus cannot tell the applicant or employee the specific reason for the actions; (3) provide notice of the individual's right to obtain a free copy of the report on which the adverse action was based within sixty (60) days of notice of the action; and (4) provide notice of the individual's right to dispute the accuracy or completeness of any information in the report with the consumer reporting agency (15 U.S.C. § 615(a)).

An investigative consumer report, which is viewed as a much more intrusive inquiry and which contains information collected from personal interviews with neighbors, friends, or associates of the consumer, requires additional obligations. The act (15 U.S.C. § 603(d)(3)(e)) defines an investigative consumer report as:

> *"a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information".*

If a city wants to use an investigative consumer report, it must disclose to the applicant that "the investigative consumer report may be obtained" and "inform the employee or applicant that he or she has a right to request additional disclosures of the nature and scope of the investigation" and provide the current or prospective employee with a "summary of the consumer's rights" (15 U.S.C. § 606(a)(1)). The city would also have to certify to the consumer reporting agency that it "made the appropriate disclosures and will comply with the disclosure on request of nature and scope of the investigation"

(15 U.S.C. § 606(a)(2)). This would not affect investigative reports generated using internal investigators for public safety departments. If a city, however, is using an outside firm to conduct investigative consumer reports, then it must comply.

If the city decides to reject the applicant based in whole or in part on an investigative consumer report, the city also must provide the applicant with a copy of the report and the summary of rights before taking such action. After taking adverse action, the city must also provide notice to the applicant or employee of the adverse action, provide the name, address and telephone number of the consumer reporting agency that furnished the consumer report on which the adverse action was based and notify the applicant or employee of the right to obtain the consumer reporting agency report (15 U.S.C. § 615(a)).

EXAMPLES:

You advertise vacancies for cashiers and receive 100 applications. You want credit reports on each applicant because you plan to eliminate those with poor credit histories. What are your obligations?

ANSWER: You can get credit reports if you notify each applicant in writing that a credit report may be requested and if you receive the applicant's written consent. Before you reject an applicant based on credit report information, you must make a pre adverse action disclosure that includes a copy of the credit report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if credit report information affected your decision.

You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that only responsible individuals are considered for the position. What are your obligations?

ANSWER: You cannot get consumer reports unless the employees have been notified that reports may be obtained and have given their written permission. If the employees gave written permission in the past, you need only make sure that the employees receive or have received a "separate document" notice that reports may be obtained during the course of their employment — no more notice or permission is required. If employees have not received notice and given permission, you must notify the employees and get their written permission before you get their reports. In each case where information in the report influences your decision to deny promotion, you must provide the employee with a pre adverse action disclosure. The employee also must receive an adverse action notice once you have selected another individual for the job.

A job applicant gives you the okay to get a consumer report. Although the credit history is poor and that's a negative factor, the applicant's lack of relevant experience carries more weight in your decision not to hire. What's your responsibility?

ANSWER: In any case where information in a consumer report is a factor in your decision — even if the report information is not a major consideration — you must follow the procedures mandated by the FCRA. In this case, you would be required to provide the applicant a pre adverse action disclosure before you reject his or her application. When you formally reject the applicant, you would be required to provide an adverse action notice.

The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant, whose credit report shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another, whose credit report shows only one credit account, because

you want someone who has shown more financial responsibility. Are you obliged to provide any notices to these applicants?

ANSWER: Both applicants are entitled to a pre adverse action disclosure and an adverse action notice. If any information in the credit report influences an adverse decision, the applicant is entitled to the notices — even when the information isn't negative.

The FACTA amendment also requires that any person who maintains or possesses consumer information must be prepared to dispose of those records in a way that ensures that the information will not be accessed or used improperly (16 C.F.R. § 682.3(a)). This requirement is intended to protect consumer privacy and to prevent identity theft. It addresses only the disposal of consumer information, not all employment information. It also does not address retention schedules or how records should be kept or maintained.

A consumer report is covered, however, if it is in paper, electronic or other forms. If a city acquires consumer information, the city must take "reasonable measures to protect against unauthorized access to or use of the information" (16 C.F.R. § 682.3(b)), when the city disposes of it. Disposal under the act means "the discarding or abandonment of consumer information or the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored" (16 C.F.R. § 682.1(c)).

*(**NOTE:** The Fair and Accurate Credit Transaction Act has since been amended to establish "Red Flag and Identity Theft" provisions. More information about the Red Flag rules can be found in the MTAS publication "Model Identity Theft Policy and FACTA Compliance" by Josh Jones, Legal Consultant.)*

Reasonable measures for disposing of consumer report information, as suggested by the act (16 C.F.R. § 682.3(b)(1-3)), could include establishing and complying with policies to:

- Burn, pulverize, or shred papers containing consumer report information so that the information cannot be read or reconstructed;
- Destroy or erase electronic files or media containing consumer report information so that the information cannot be read or reconstructed; and
- Conduct due diligence, and hire a document destruction contractor to dispose of material specifically identified as consumer report information consistent with the rule.

Under the act (16 C.F.R. § 682.3(b)(3)), "due diligence" includes:

- Reviewing an independent audit of a disposal company's operations and/or its compliance with the rule;
- Obtaining information about the disposal company from several references;
- Requiring that the disposal company be certified by a recognized trade association; and
- Reviewing and evaluating the disposal company's security policies or procedures.

The rules further define "dispose," "disposing" and "disposal" to mean the discarding or abandonment of the consumer information or the sale, donation or transfer of any medium (such as computer equipment) that stores the information (16 C.F.R. § 682.1(c)).

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or who fail to provide pre adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to

recover court costs and reasonable legal fees (15 U.S.C. §§ 616-617). The law also allows individuals to seek punitive damages for deliberate violations. In addition, the FTC, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties (15 U.S.C. §§ 621(a-c)).

Employers who fail to comply with the rules are subject to FTC fines and penalties, which can be substantial if a large number of files are involved. In the event a person willfully fails to comply with any requirement imposed by the law, that person is liable to that consumer in an amount equal to the sum of (a) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000 or in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater (15 U.S.C. §§ 616(a)(1)). The person could also be held liable for such amount of punitive damages as the court may allow (15 U.S.C. §§ 616(a)(2)) and, in the case of any successful action to enforce any liability, the cost of the action together with reasonable attorney's fees as determined by the court (15 U.S.C. §§ 616(a)(3)).

In the event of a knowing violation, the individual/company that obtains the consumer report is liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000 whichever is greater (15 U.S.C. § 616(b)). Additionally, if the state has reason to believe that any person has violated the act, it may bring action to enjoin such violation in any appropriate United States district court and fine such person damages of not more than $1,000 for each willful or negligent violation. In the case of any successful action, the individual/company will have to pay for the cost of the action and reasonable attorney fees as determined by the court (15 U.S.C. §§ 621(c)(1)).

If your city routinely conducts credit checks on applicants or employees, you may want to consider only conducting the checks on positions involving money (finance department employees, police officers, etc. ...). Then be sure to provide notice and follow the guidelines when an adverse decision is made.

New model notices are now available and can be found in the November 30, 2004, Federal Register (16 C.F.R. Part 698, appendix F). The summary notice can be found on the FTC Web site at www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf. The general summary of consumer rights notice includes, among other things, consumers' right to see their credit files and know when they have been used against them, to correct inaccuracies, and to opt-out of unsolicited offers. The summary notice also notes that, in addition to identity theft victims, active duty military personnel have additional rights under the FCRA and FACTA.

For more information about the FCRA or the FACTA, contact Human Resources Consultants Bonnie Curran Jones at bonnie.jones@tennessee.edu, Richard L. Stokes at richard.stokes@tennessee.edu or Legal Consultant Josh Jones at (615) 532-6827.

You also may contact your MTAS municipal management consultant in Knoxville, Johnson City, Nashville or Jackson.

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